166-720

Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. ..750

THE REPUBLICAN MINING COMPANY,

Plaintiff in Error,

vs.

THE TYLER MINING COMPANY.

On petition of the Republican Mining Company for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of W. B. Heyburn for Petitioner.

Pigott & French, Printers, Spokane.

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STATEMENT OF FACTS.

This is an application for a writ of certiorari to the Circuit Court of Appeals of the Ninth Circuit under the

provisions of the Act of Congress of March 3, 1891, chapter 517, section 5.

The enquiry upon this application, therefore, is first, whether the matter is of sufficient importance in itself and sufficiently open to controversy to make it the duty of this Court to issue the writ applied for, in order that the case may be reviewed or determined as if brought here on appeal or writ of error.

Law Ow Bew, petitioner, 141, U. S., 587.

The question involved derives its importance from the fact that the decision of the Circuit Court of Appeals sought to be reviewed in this proceeding, is directly in conflict with the decision of the Supreme Court of the United States in the case of the Iron Silver Mining Co. vs. The Elgin Mining Company, 118, U. S., 196, and the case of King. The Amy-Silversmith Min. Co., 14th. Supreme Court Reporter, page 510, upon a principle of law which is involved in the case at bar and which completely disposes of the rights of the parties; and the gravity and importance of the question is evidenced by the fact that your petitioner and all other persons claiming property rights under the principles established by your Honorable Court in the cases cited cannot secure them under the application of the doctrine laid down by the Circuit Court of Appeals of the Ninth Circuit in the case at bar.

In this case your petitioner has expended large sums

of money in developing the mining property in question, and under the decision of the Supreme Court of the United States in the cases before cited, your petitioner is entitled to the property in question, while under the decision of the Circuit Court of Appeals it is not entitled to it.

The first question in controversy is whether or not the owners of a mining claim in which the lode passes through one side line on a course north 54 degrees and 32 minutes west and through an end line having a course of north 19 degrees and 40 minutes east have the right to follow such lode on its dip beyond the vertical lines of the claim.

The petition for the writ shows that in an action at law to recover possession of certain premises claimed as the Tyler mine, situated in Yreka Mining District, Shoshone County, Idaho, The Tyler Mining Company, plaintiff below, claims to be the owner of a mining claim, located under the laws of the United States, called the Tyler mining claim, and the plaintiff in error claims to be the owner of the Republican Fraction Mining claim, situated in the said Mining District.

The Tyler Mining Company alleges in its complaint as its cause of action that it owns a mining location, called the Tyler, in which a large ledge or vein of rock in place bearing silver and lead exists; that on its strike or course the said ledge passes lengthwise through the said claim, cutting the end lines thereof; that the top or

apex of the ledge lies inside the surface lines of the claim; that the ledge in its downward course departs from the perpendicular at an angle of about 40 degrees from the horizontal, said incline being in a southerly direction; that the ledge extends to a great depth; that, by reason of its departing from a perpendicular course, said ledge or vein extends in depth far outside and south of the southerly side line of said Tyler claim at the surface; that the defendant entered upon that portion of the said Tyler ledge which lies outside of said southerly side line in depth and took possession thereof, ousting and ejecting The Tyler Mining Company therefrom, and took ores from the said Tyler ledge of the value of two hundred thousand dollars, and have ever since the month of June, 1891, withheld said premises from the plaintiff.

The prayer of the complaint is for the recovery of the possession of the Tyler ledge or so much thereof as is alleged to be withheld, and for damages, etc.

The case has been three times tried in the Circuit Court of the United States for the District of Idaho, and three times decided in the Circuit Court of Appeals, and on Certiorari from that Court to the Supreme Court of the United States, the case was decided in favor of the Last Chance Mining Company, one of the defendants as against the Tyler Mining Company, leaving the question of the rights between this plaintiff in error and the defendant in error open. The case is reported in

the 157 United States, at page 683.

The plaintiff in error filed a separate answer denying the material allegations of the complaint, and alleged affirmatively that all of the ores, minerals and rock that had been extracted by it and carried away from the point in controversy are and were a part of a ledge having its top or apex within the surface lines of the Republican Fraction lode mining claim, the property of the defendant, which said ledge and ores belonged to and are a part of the Republican Fraction lode mining claim, located on the 1st day of November, 1885, by the grantors and predecessors in interest of the defendant. That the said Republican Fraction lode mining claim is now the property of the defendant, together with all the ores, ledges and veins, having their outcrop and apex within the surface lines of said claim. Denied that any of the ores, metals, minerals, rock or earth which it had mined or removed from within the surface side lines of the said Republican lode mining claim, extended downward vertically, were a part of or belonged to any vein, ledge or lode having its top or apex, outside the surface lines of the Republican mining claim, the property of the defendant.

This case was presented to the Court upon the following agreed statement of facts.

AGREED STATEMENT OF FACTS.

The parties to this action agree to the following statement of facts.

First.—That the Tyler Mining Company is the owner of the Tyler Mining claim as described in the fourth paragraph of the complaint, and the said Tyler mining claim, of which the ground so described is a part, was located on September 20th, 1885, and has been duly conveyed to the plaintiff in this action.

Second.—That the Last Chance Mining Company is the owner of the Last Chance mining claim, as described in the said defendant's supplemental answer on file in this case, and that the boundaries of both claims are correctly laid out in the diagrams on file in this action.

Third. That a vein of mineral bearing rock and earth is found in both of said mining claims at the point of discovery on each, and had been discovered therein prior to their location; that the course of the vein in each of these claims is as shown in the diagram; its width, approximately, being about three hundred (300) feet, and its dip, from the apex, which is found upon each of said claims, is to the southwesterly at an angle of about forty-five (45) degrees from the horizontal. It is further admitted that the line of the vein as indicated on the diagram and models is approximately the line of the foot-wall, and that the said vein passes through the southerly side line of the Tyler claim as originally

located, and crosses the northwesterly end line thereof, and said vein, after crossing the said southerly side line of the Tyler claim, passes through and outcrops upon the Last Chance claim, as shown upon said diagram; that the discovery upon each of said claims was upon said vein so out-cropping, and the ores and ore bodies in controversy are in and a part of said vein. It is further admitted that the Last Chance claim was located on the 17th day of September, 1885, and that the rights of said Company run from that date. The legal existence of the two corporations, the Tyler Mining Company and the Last Chance Mining Company, is admitted.

Fourth.—It is admitted that the apex of the vein is within the side lines of the Tyler and also of the Last Chance claims, and that the Last Chance has taken no ores which are not found perpendicularly beneath its surface ground.

Fifth.—It is admitted that in 1887, the The Tyler Mining Company applied for a patent upon the Tyler claim, as originally located, and that the then owners of the Last Chance mining claim duly filed an adverse claim to a certain portion thereof, and that the proceedings upon which application was made and said adverse was founded, are correctly set forth in a certified transcript of such proceedings, which is here made a part of this statement, and to be considered as such.

Sixth.—It is further agreed that the Last Chance

Mining Company made an application for a United States patent for the Last Chance Mining Claim, and that such patent has issued therefor, the proceedings upon which said application for patent and the patent issued thereon, as certified by the Commissioner of the General Land Office, are hereby admitted as a part of this statement.

Seventh.– It is further agreed that the judgment-roll the findings of fact, and conclusions of law certified in the case of the Last Chance Mining Company against the Tyler Mining Company, heretofore offered in evidence in this case, and referred to in the decision of the United States Supreme Court, in considering this case, are made a part of this statement.

Eighth.—It is further agreed that the map of the plaintiff, "Exhibit A," and models may be treated and regarded as a part of this statement, for any purpose for which the Court may deem material, and that the diagram, as found in the report of the case in 54 Fed. Rep. page 284, is the diagram which is referred to herein, and is made a part hereof. It is admitted that the defendant, the Last Chance Mining Company, has taken a large amount of ore out of the vein aforesaid, claiming to be the owner thereof, and if the Court shall find that the Tyler mining Company is entitled to said vein, under the said surface boundary, that the Last Chance Mining Company is liable therefor, and that an accounting of the value of the same may be had hereafter to

ascertain such value. It is further agreed that the Republican Fraction mining claim was duly located on the 1st day of November, 1885, and that said location so far as the making said discovery, marking said surface boundaries, and recording such location are concerned, was made in conformity with the law, and that the annual labor required by law has been duly performed thereon; that the vein discovered in the said Republican Fraction Mining claim is the same vein which passes out through the southerly side line of the Tyler claim.

It is agreed that the vein on which the said Tyler, Last Chance and Republican Fraction claims are located passes on its dip underneath the surface limits of the Last Chance Fraction and Skookum Fraction claims, as they are laid down in said diagram.

Dated this ..... day of September, 1895.

JNO. R. McBRIDE,
Attorney for Plaintiff.

W. B. HEYBURN,
Attorney for Defendants.

(Endorsed:) Filed Oct 16th, 1895.

A. L. RICHARDSON,
Clerk.

The 3rd statement of facts refers to the location of the vein over which the controversy arises, whereby it appears that the course of the vein is as shown upon the diagram; that its width, approximately, is about three hundred feet, and that its dip is to the southwest at an angle of about forty-five (45) degrees from the horizontal; that the line of the vein, as indicated on the diagram and models, is approximately the line of the foot-wall, and the said vein passes through the southerly side line of the Tyler claim as originally located, and crosses the northwesterly end line thereof.

The 4th, 5th, 6th and 7th statements of facts refer to the question arising between the Tyler and Last Chance companies.

In the 8th statement of facts, occurs the first reference to the mining claim of the plaintiff in error, as follows:

"It is further agreed that the Republican Fraction mining claim was duly located on the 1st day of November, 1885, and that said location, so far as the making of said discovery, marking said surface boundary, and recording such surface location are concerned, was made in conformity with the law; that the annual labor required by law has been duly performed thereon; that the vein discovered in said Republican Fraction mining claim is the same vein which passes out through the southerly side line of the Tyler claim."

A jury was waived by stipulation and the Court, after hearing argument, made findings of fact in conformity

with the agreed statements and as conclusions of law found that the Tyler Mining Company was entitled to judgment against the Republican Mining Company for the possession of the premises described in the complaint and in the agreed statement of facts, to-wit:

That certain lode or vein in place, bearing valuable minerals, having its outcrop or apex within the limits of the Tyler mining claim as described in said agreed statement of facts; with the right as against the said Republican Mining Company, to follow said ledge or vein upon its descent into the earth to any depth between the two perpendicular planes continued in their own direction passed through the two end lines of the Tyler claim as the same is now described in the patent issued by the United States for said claim, even though said vein should extend outside of the vertical side line of such Tyler mining claim, and under the Republican Fraction claim, the property of the plaintiff in error, and that the plaintiff was entitled to its costs against the plaintiff in error. Judgment was entered in conformity with these conclusions of law. (Transcript page ——.)

The plaintiff in error presented and settled a bill of exceptions as follows:

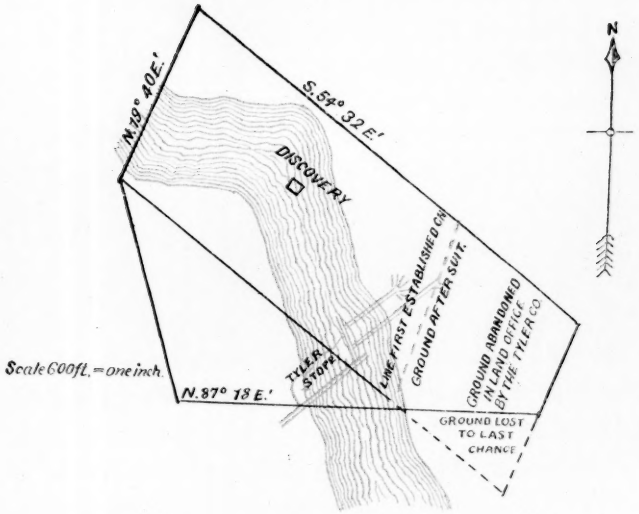
BILL OF EXCEPTIONS.

BE IT KNOWN, that on the 3rd day of April, 1896, in the above entitled Court, upon the statement of facts submitted, said Court ordered judgment against

the Republican Mining Company, one of the defendants in the above entitled action. That upon the agreed statement of facts upon which the said case between the Tyler Mining Company and the Republican Mining Company was submitted to the Court for its decision, it appeared that the Republican Fraction Mining claim, was located on the first day of November, A. D. 1885. That the title acquired by virtue of said location and acts in pursuance thereof is in the defendant, the Republican Mining Company. That the Tyler mining claim, the property of the plaintiff, was originally located on the 20th day of September, 1885, and was fifteen hundred (1,500) feet in length by six hundred (600) feet in width. That the vein upon which the discovery was made in said Tyler mining claim, and which vein the owners of the said claim are seeking to follow on the dip under and within the ground of the Republican Mining Company, passed in at the N. W. end line of said Tyler claim, and running through the said Tyler claim for a distance of about 1,140 feet, passed out through the southerly side line of said claim.

That about August, 1891, the plaintiff withdrew its southeasterly end line back to a point where the same would intersect the ledge before leaving the Tyler ground.

That at the time of the location of the Republican Fraction Mining claim a discovery was made within the boundaries of said claim upon the same ledge which


N. 19° 40 E.'
S. 54° 32 E.'
DISCOVERY
LINE FIRST ESTABLISHED ON GROUND AFTER SUIT.
GROUND ABANDONED IN LAND OFFICE BY THE TYLER CO.
N
E
Scale 600 ft. = one inch.
N. 87° 18 E.'
TYLER STOPS
GROUND LOST TO LAST CHANCE

Original Tyler Location made September 20th, 1885.

Amended Tyler Location in Land Office, April 22nd, 1889.

Amended Tyler Location first marked on ground, Aug., 1891.

Republican Fraction Claim, Located November 1st, 1885.

passed through the Tyler claim, said ledge being wide enough to extend over into the Republican Fraction claim, at its southeasterly end.

The relative position of said claims is shown by the opposite diagram, upon which the ledge is shown to pass through the said claims as herein set forth of the width of about three hundred feet, that being the width of the ledge stipulated in the agreed statement of facts. And the tunnels and works passing from the Tyler claim into the Republican Fraction claim are also shown upon the said diagram. And the stope from which the plaintiff has been and is now seeking to extract ore within the lines of the Republican Fraction claim is indicated upon said diagram.

That the Court held that the Tyler claimants had extra-lateral rights as against the defendant, the Republican Mining Company, as the owner of the Republican Fraction Mining Claim, by reason of the fact that the original location of the Tyler claim was prior to the location of the Republican Fraction claim, and that the Tyler Mining claim would have extra-lateral rights upon the ledge as shown in the foregoing diagram, notwithstanding the fact, that said ledge intersected one end and one side line in the manner shown upon said diagram, and that its right to follow the vein beyond the southerly side line of said claim was not dependent upon the amendment of its lines, which was made long after the discovery of the said ledge within the Republican Frac-

tion claim and the location of the Republican Fraction claim thereon. And the Court thereupon held that the plaintiff, the Tyler Mining Company, may follow said ledge on its dip under and within said Republican Fraction claim, to all of which the defendant then and there excepted which exception was duly allowed, and the said Republican Mining Company presents this, its Bill of Exceptions, for allowance and settlement.

JAS. H. BEATTY,
Judge.

Settled and signed this April 3d, 1896.

(Endorsed:) Filed April 3d, 1896.

A. L. RICHARDSON,
Clerk.

It appears from this bill of exceptions that the Tyler location was first amended or changed as to its shape by a filing made in the land office on April 22nd, 1889, and that the amended location of the Tyler was first marked upon the ground in August, 1891, after the commencement of this suit, and nearly six years after the location of the Republican Fraction claim. There never was any amended location notice filed by the Tyler in the office of the local, or County, Recorder in the District, or County, where said claim was situated. The Court held that the Tyler claimants had extra-lateral rights as against the Republican Mining Company,

the owner of the Republican Fraction mining claim, by reason of the fact that the original location of the Tyler claim was prior to the location of the Republican Fraction claim, and that the Tyler claim would have extra-lateral rights upon the ledge as shown in the diagram, notwithstanding the fact that the ledge intersected one end and one side line, and that its right to follow the vein beyond the southerly side line of the claim was not dependent upon the amendment of its lines, and the Court thereupon held that the plaintiff, the Tyler Mining Company, may follow the said ledge upon its dip under and within the said Republican Fraction mining claim.

The plaintiff in error filed its petition for a writ of error on May 11th, 1896, which was duly issued, and the case was argued and submitted at the October term, 1896, of the U. S., Circuit Court of Appeals for the Ninth Circuit, and the judgment of the Circut Court affirmed, and a decision rendered therein as appears in the Transcript, which said opinion was erroneous in that it was in conflict with the ruling of your Honorable Court in the case of the Iron Silver Mining Co. vs. Elgin Mining Co., reported in the 118 U. S., p. 196, and in the case of King vs. Mining Co., in the 14th. Supreme Court, Reporter, p. 510.

A certified copy of the entire record of the case in the Circuit Court of Appeals is furnished in conformity with

Rule 37 of this Court, relative to cases from the Circuit Court of Appeals.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in the said cause is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination in conformity with the provisions of section 6 of the act of congress entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases jurisdiction of the Courts of the United States and for other porposes," approved March 3, 1891, the said cause being made final in the said Circuit Court of Appeals by the said act; and your petitioner has no right of appeal or writ of error in this case, for the reason that jurisdiction of the same was originally assumed by the United States Court because of the diversity of the citizenship of the parties plaintiff and defendant.

ASSIGNMENTS OF ERROR.

I.

The ruling of the Court that the right of each party to follow the lode on its strike or true course lengthwise is terminated at the point where the lode crosses the side line of the Tyler.

II.

That the Tyler claimants might follow the ledge on

its dip under and within the lines of the Republican Fraction Mining Claim.

ARGUMENT.

So far as the right to the possession of the vein in controversy is concerned, there is but a single question presented to the Court for consideration, and that question is stated in the quaere of the Supreme Court of the United States in concluding its opinion in the case of the Last Chance Mining Company vs. The Tyler Mining Company, 157 U. S. 683, wherein the Court says:

"Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler claim the vein enters through an end and passes out through a side line, while by the amended location, it passes in and out through end lines. Of course, if the latter is a valid location the owner of the claim would unquestionably have the right to follow the the vein on its dip beyond the vertical plane of the side line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extended downward? It has been held by this Court in the cases heretofore cited that where the course of a vein is across instead of lengthwise of the location, the side lines

become the end lines and the end the side lines; but there has been no decision as to what extra territorial rights exist if a vein enters at an end and passes out at a side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface, and no more? Or may the Court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip in whatever direction that may go, within the limits of some equitably created end lines?

"If the common law rule as to real estate obtains in such a case, then, of course, on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside the vertical plane of any boundary lines; and even if the amended application was perfectly valid, the question would arise whether the rights acquired under it related back to the date of the original location, or arose simply at the time of the amendment, in which case there would be no doubt of the fact that the owners of the Last Chance had by years a prior location. However, in the view we have taken of the other question it is unnecessary to consider this."

This leaves the question squarely open for decision, and the consideration of it cannot be said to have been closed by any decision recognized by the Supreme Court as binding or conclusive in the matter. The fore-

going diagram has been accepted by both parties and certified by the Court as correctly representing the situation of the mining claims and ledge therein.

The question simply stated is whether or not the locators of the Tyler claim had the right to follow the vein beyond its exterior boundaries, prior to the establishment of the intermediate end line, first made upon the ground after the commencement of this action.

The United States Supreme Court has said in Iron Silver Mining Co. vs. Elgin Mining Co. 118 U. S., page 196, that parallelism in the end lines is essential to the right to follow the vein beyond the exterior boundaries on its dip. This doctrine has been affirmed by that Court in several instances, and that Court has also frequently said that the end lines of a claim are those which intersect the ledge in its course, and has refused to recognize as end lines those which did not intersect the ledge, simply because the locator so designated them. Applying these two principles of law to the case under consideration, we find that prior to the commencement of the suit, no two lines of the Tyler claim were parallel or approximately so. There were but three lines of the location of the Tyler claim which intersected this ledge; one of them, the northwesterly end line, had a course of North 19 degrees, 40 minutes east; another, the Southwesterly side line, had a course of south 54 degrees 32 minutes east; the other, a diagonal line merely touching the vein at its easterly side, had a course north

87 degrees 16 minutes east. No plane can be drawn upon any of those lines upon which the locator would have the right to follow this vein beyond the exterior boundaries of the claim into the ground in controversy. It was, therefore, necessary either to *establish a new end line* parallel to the Northwesterly end line, or to *imagine* one, or *presume* one to be established.

This is in violation, not only of all of the decisions of the Courts touching the location of claims, but of the act of congress under which locations are made. By that act it is required that the locator of a claim shall mark his location *upon the ground* so that its boundaries can be readily traced. Nothing is left to the imagination as to the existence of a line; it is required to be made plain and definite, so that every person may be able to locate it and determine its position accurately. These physical boundaries marked upon the ground have always been recognized as controlling the rights of the locator, even as against records and written documents. They are the highest evidence of title after the discovery of the claim. The reason for thus dignifying these physical boundaries upon the ground is obvious. The persons interested in knowing the whereabouts of the claim are generally far removed from the records; when the necessity for this information arises, as a rule, they are upon the ground or in the vicinity of the claim, and they are entitled to have the location so marked that they may determine then and there the extent and loca-

tion of the claim, in order that they may be enabled to select *their* ground and make their location accordingly, in the assurance that they will not afterwards be disturbed by any claim that the real boundaries *were not as marked upon the ground.* It resolves itself down to the question of notice. The primary object in requiring that the location shall be marked upon the ground so that its boundaries may be readily traced, is that actual notice may be given to every person of the rights of the claim made by the locator. It would, therefore, be most unreasonable to allow the claim of the defendant in error in this case that the law *presumed* or by *implication* established, the intermediate end line as shown on the diagram, in the absence of any marking of such line upon the ground. It would be a clear violation of the rule of notice to adjoining claimants of what the locator intended to claim.

Had it happened in this case that the ore bodies instead of dipping to the South or Southwest had dipped to the North or Northwest, we would have found the locator of the Tyler claim trying to re-establish his northwest end line instead of the southwest. He would have been seeking to so adjust his lines that he might follow this ledge in a westerly or northwesterly direction instead of a southerly or southwesterly direction. This clearly illustrates the inequity of the rule sought to be established by the defendant in error, which would permit him to select one line of the claim as a basis and

adjust all the other lines to it; in the process of such selection his neighbors could have no notice of his intention in the matter until he was ready to act.

The principle of law upon which the United States Supreme Court has repeatedly decided, that where a ledge crosses the side lines those lines become end lines is applicable to the case under consideration. The same reasons for the rule exist. The course of the ledge is shown by the red shaded lines on the diagram, to be diagonally through the Tyler claim, and the main body of the ledge in which the ore bodies are known to exist lies for nearly its entire width within the surface boundaries of the Republican Fraction claim. Upon that portion of the ledge the locators of the Republican claim made their discovery and their title is based upon it. The stope marked on the diagram "Tyler stope" is directly under the surface out-cropping of the ledge upon which the Republican Fraction claim was located. It is admitted in the statement of facts upon which the case was submitted to the Court that the Republican Fraction claim was a valid location made only forty days after the original Tyler location.

When a man finds a mine or acquires one in any manner adjacent to an existing claim, he should be able to determine from the visible lines of that claim marked as upon the ground what its rights would be with reference to neighboring claims. Very often the oldest claim and the one that would claim these extra-lateral rights it not

developed when the neighboring claims are already far advanced in that direction. If these first locations can thus lay in hiding under cover until the value of the neighboring mines is determined and then select any of its lines as a basis upon which to adjust the other lines and claim extra-lateral rights accordingly, it would work an injustice to his neighbors and would violate both the letter and spirit of the law. The requirement in the act of Congress regulating the location of mining claims, that they should "be so marked upon the ground that their boundaries can be readily traced," is to prevent the the swinging of claims, uncertainty and indefiniteness as to the location of the lines by which the boundaries of the claim are marked upon the ground.

The principle behind this requirement is that of "notice." The object of the requirement is that other locators may have definite notice of the claim made by their neighbors, and also that existing rights may not be affected by the changing of lines by neighboring claimants.

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The principle behind this requirement is that of "notice." The object of the requirement is that other locators may have definite notice of the claim made by their neighbors, and also that existing rights may not be affected by the changing of lines by neighboring claimants.

The following two diagrams will illustrate the principle to be discussed.

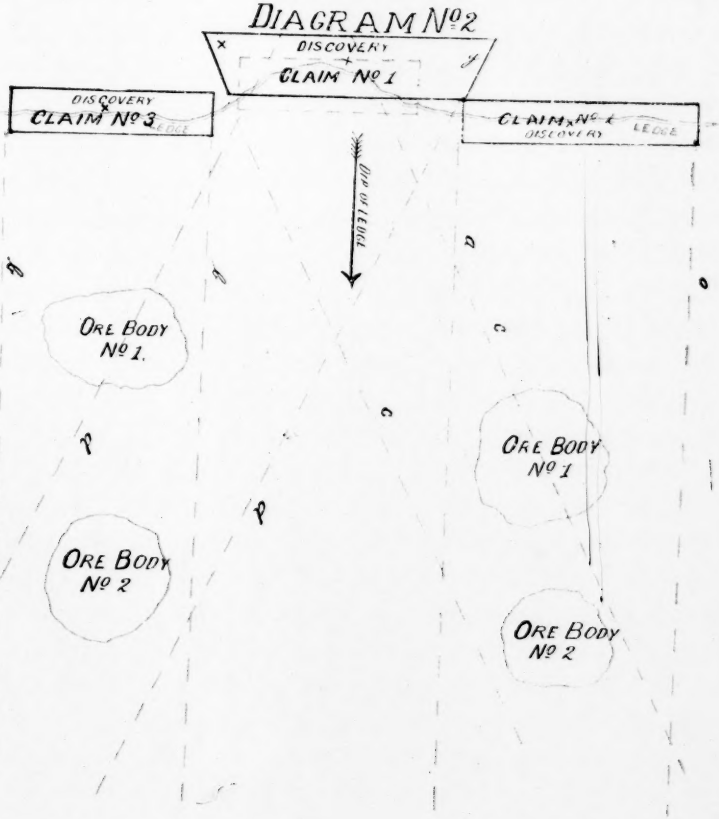

DIAGRAM No3.

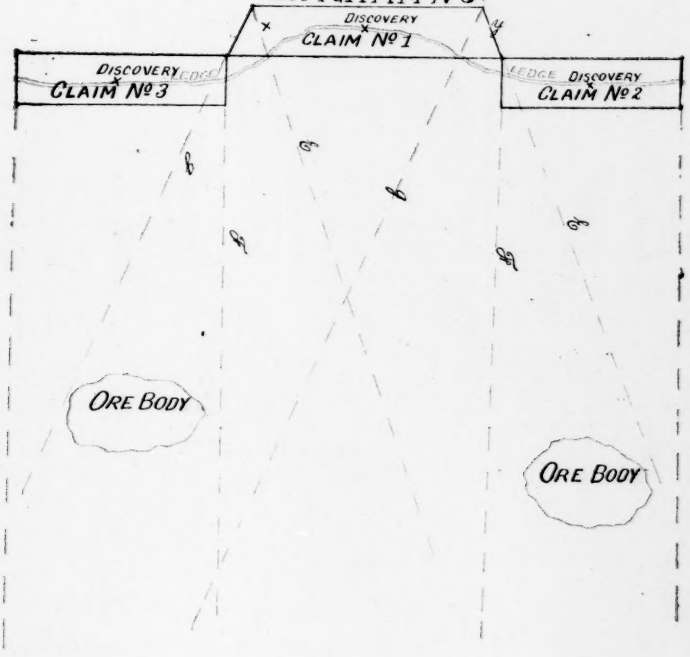
DISCOVERY
CLAIM No 1
DISCOVERY
CLAIM No 3
LEDGE
LEDGE
DISCOVERY
CLAIM No 2
ORE BODY
ORE BODY

Diagram No. 2 illustrates this question as applied to locations with end-lines converging towards the dip of the ledge. Claim No. 1 is the older location, claims Nos. 2 and 3 are located upon the same ledge. Claim No. 1 was located without sufficient exploration to determine whether or not the ledge passed out of the end-lines of the claim or extended at all beyond the point of discovery. Had these facts been determined before staking out the claim the locator would undoubtedly have located the claim as indicated by the broken red lines enclosing said discovery, in which event the ledge would have passes through both end lines and a plane drawn on his end lines toward the dip of the ledge would not have interfered with the claim No. 2 or claim No. 3.

The fact that the side lines of claim No. 1 are of unequal length or that the end lines converge toward the dip of the ledge is not an unusual condition of affairs in locations made by that class of prospectors who stake their claims without first determining the courses of their ledges.

The three claims shown in this diagram No. 2 are all on the same ledge. The bend in the ledge is one of most frequent occurrence, but to an intelligent prospector presents no difficulty so far as determining the course of the ledge is concerned.

The true course of the ledge is easily to be determined

by slight exploration on the foot or hanging wall. A level line taken along the course of either wall indicates substantially the true course of the ledge, regardless of the course indicated upon the surface which may be thrown out of line as the ledge crosses valleys or hills. This fact is known to all prospectors of any experience.

Diagrams Nos. 2 and 3 illustrate the evil possibilities resulting from the application of the doctrine of the Circuit Court and the Circuit Court of Appeals in the case at bar as well as the principles announced in the case of the Del Monte Min. & Milling Co. vs. the New York and L. C. Min. & Milling Co., 66 Fed., page 212, cited by Judge Hallet, in the eighth circuit, and in the case of Carson Gold and Silver Min. Co. vs. North Star Min. Co., in the 73 Fed., page 597, cited by Judge Beatty in the ninth circuit, and in the case of the Amy and Silversmith Consolidated Mining Company vs. King in 9 Mont. 543.

These cases all hold in effect that the locator has the right to establish new end lines at the point where the ledge departs from the location through the side-line, thus creating a new and different plane from that indicated by the end lines of his claim marked upon the ground. Indeed Judge Hallet in the Del Monte case in 55 Fed., on page 215, says: "We can keep within the end lines fixed by the locator in respect to any extra-lateral right that may be recognized without drawing any end line; and if there be magic in the word 'line,'

it will be better not to use it." And the Court proceeds to establish two end lines neither of which corresponded with any original end line of the location.

The Supreme Court of Colorado has established an entirely different rule.

It will be seen by the diagrams No. 2, which illustrates a claim with lines converging toward the dip of the ledge, and diagram No. 3, which illustrates a claim with lines diverging toward the dip of the ledge, that under the rule of the decisions referred to the locator of claim No. 1 could select his enemy. He might lie perfectly still making no development on his claim until No. 2 and No. 3 had made large expenditures and developed rich ore bodies on the dip of the ledge within the plane upon which they would be entitled to follow the same on its dip and then select his victim being governed by the value of the respective ore bodies developed by his neighbor.

If claim No. 2 developed richer ore bodies he could adopt "X" as his end line drawing the end line "Y" in to a point where it would intersect the ledge under the rule announced by Judge Hallet and by the Circuit Court of Appeals in the case at bar. This would enable him under the rule in those cases, by reason of being the prior locator, to drive No. 2 out of these ore bodies because they lie within a plane drawn on his end lines and should No. 3 discover richer ore bodies he would then

abandon his end line "X" and drawing it in to a point to intersect the ledge establish a plane upon which he would take the ore bodies developed by claim No. 3.

These suggestions seem to us sufficient to apply the diagrams to the facts of the case at bar.

The Court will readily see the other possibilities arising out of the application of the rule contended for by the Tyler claimants in this case and the rule announced by Judge Beatty and Judge Hallet in the cases referred to.

We cannot harmonize such a rule with that established by the United States Supreme Court in the case of the Iron Silver Mining Co. vs. Elgin Mining Co., in 118 U. S., page 196.

In that case the ledge is shown by the diagram (page 203) to intersect what the locator claimed as one end line and one side line. The course of these two lines intersected by the ledge were as divergent as that of the two lines of the original location of the Tyler which were intersected by the ledge.

If the rule invoked against your petitioner is to prevail why not require the artificial or new end line of the Tyler to be drawn at the point where the *foot wall* of the ledge crosses the south line of the Tyler.

This would leave the Republican claim the owner of that portion of the ledge in which the stopes are shown to be.

The discovery of the Republican claim was made upon the broad ledge lying within the boundaries thereof, and the owner thereof makes no claim to anything beyond the exterior lines thereof.

The law contemplates that the locator will carefully determine by exploration in what direction his ledge lies before making the location. That he will then so locate it that the lines which he intends to rely upon as end lines will intersect the ledge. That if he neglects to exercise this care and precaution and fails by reason of such neglect to so locate his claim as that under the law he will have the right to follow it beyond its exterior boundaries, he shall be confined within them. The failure to so locate the claim that under the statute he might have extra-lateral rights does not affect the validity of the location so far as the ownership of the ledge and minerals within the exterior boundaries thereof are concerned. It only affects the right to follow the ledge on its dip beyond the exterior boundaries; ours is the only country where this right is now given to the locator under any circumstances.

The grant under the act of 1872 gives the locator the exclusive right of possession to the quantity of surface ground not exceeding a specified amount, and not only to the particular ledge or vein located, but to all other veins, lodes or ledges, the top or apex of which lies within the surface lines of his location, with the right to follow such veins, lodes or ledges to any depth; but

these additional rights are granted subject to the limitation that in following the veins, lodes or ledges the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the *end lines* of his location, and the further limitation upon his rights in cases where two or more veins intersect or cross each other. So says the Court in the case of the Eureka Mining Co vs. Richmond 9th. Morrison, 597.

The same learned Justice who wrote the opinion in that case again takes up the consideration of this question in the Supreme Court of the United States in the case of Iron Silver Mining Co. vs. Elgin Mining Co., in the 118th. U. S., page 196, in which this single question of the extra-lateral rights of the owners of a mining claim were before that Court for consideration. Wherein, referring to section 2322 of the Rev. Stat. of the U. S. the Court says:

"This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The locators have the exclusive right of possession and enjoyment of 'all the surface included within the lines of their locations,' and the location, by another section, must be distinctly marked upon the ground so that its boundaries can be readily traced. (Revised Statutes, 2324.) They have also the exclusive right of possession and enjoyment of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically,

although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations.' The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. *This means the end lines of the surface location, for all locations are measured on the surface.*

"The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or if so, are not at a right angle to the course of the vein. This difficulty must often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location, and in postponing the marking of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein. In Colorado the statute allows for this purpose sixty days notice of the discovery of the lode. Then the location must be distinctly marked upon the ground, and thirty days thereafter are given for the preparation of the proper certificate of location to be recorded. (Erhardt vs. Boaro, 113 U. S., 527, 533.) Even then, with all the care possible, the end lines

marked on the surface will often vary greatly from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location, than that they should be subject to perpetual re-adjustment according to subterranean developments made by mine workings. Such re-adjustment at every discovery of a change in the course of the vein would create uncertainty in title to mining claims. The rule, whatever hardship it may work in particular cases, should be settled and thus prevent as far as possible, such uncertainty.

"If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. He can only assert a lateral right to so much of his vein as lies between vertical planes drawn through those lines. Junior locators will not be prejudiced thereby though subsequent explorations may show that he erred in his location.

"The provision of the Statute, that the locator is entitled throughout their entire depth to all the veins, lodes or ledges, the top or apex, of which lies inside of the surface lines of his location, tends strongly to show that *the end lines marked on the ground must control.* It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them

outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all veins if they are not identical."

Further on in the same decision the Court says:

"Under the act of 1866, 14 Stat. 251, parallelism in the end lines of a surface location was not required but where a location has been made since the act of 1872 such *parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines.* His lateral rights by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction, that is, between parallel vertical planes. It can embrace no other portion."

It will be noticed that the Supreme Court says, in speaking of the end lines being parallel, "Such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside the vertical planes drawn through the *side lines.*"

Taking this in connection with the previous expressions in the case, wherein the Court says: "But whatever inconvenience or hardship might thus happen; it is better that the boundary planes should be definitely determined by the lines of the *surface location*, than that they should be subject to perpetual re-adjustment accord-

ing to subterranean developments made by mine workings," leads us to the inevitable conclusion that the right to follow the vein beyond the exterior boundaries can only exist where the *end lines marked upon the ground intersect the ledge and are parallel.*

In the case at bar there were no end lines marked upon the ground which either intersected the ledge or were parallel. The defendant in error is forced to rely upon an imaginary line which *might have been established but which was not.* No neighboring claimant investing money for the purchase or development of his mining claim could foretell what the owners of the Tyler mine would claim beyond their exterior boundaries, except as they were directed by the visible monuments upon the ground.

In the case of King vs. The Amy & Silversmith Min. Co., 152 U. S., page 222, the Supreme Court declines to *imply* an end line or two end lines that would intersect the vein, but rather considered the lines marked upon the ground by the locator, which intersected the ledge in its course to be the end lines in law, notwithstanding they might have been originally located as side lines. The Court says in that case, at page 227: "It is evident from the provisions cited that the location *as made and defined must control*, not only the rights of the claim to the vein or lode within its surface lines, but also any lateral rights."

Apply that principle to the case at bar and the Tyler mining claim has no lateral rights beyond its surface boundaries. The Southwesterly line marked as the *side* line crosses the strike of the vein; it, therefore, constitutes an *end* line, The Supreme Court, in the same opinion, says:

"If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. The Court cannot become the locator for a mining claimant and do for him what he alone should do for himself. The most the Court can do, where the lines are drawn incorrectly or irregularly, is to give the miner such rights as his imperfect location warrants under the statute. It cannot re-locate his claim or make new *side* lines or *end* lines. Where it finds, as in this case, that what are called side lines are in fact end lines, the court in determining his lateral rights will treat such side lines as end lines and such end lines as side lines. But the Court cannot make new lines for him and thereby enlarge his rights. He must stand upon his own location and can take only what it will give him under the law."

This doctrine has been repeated so often that there can be no longer any doubt as to the interpretation to be placed upon the statute touching this matter and what lines shall govern the owner of a mining location in determining his lateral rights.

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This doctrine has been repeated so often that there can be no longer any doubt as to the interpretation to be placed upon the statute touching this matter and what lines shall govern the owner of a mining location in determining his lateral rights.

By a reference to the diagram in the Transcript in this case it will be seen that what is termed a side line of the Tyler intersects the ledge as nearly at right angles with its general direction at the point of intersection as does the Northwesterly end line. Under the rule laid down by the Supreme Court in the cases cited the legal end lines of the Tyler claim under the original location were the lines marked on the ground as the northwesterly end line and the southwesterly side line. The line originally marked as the southeasterly end line did not intersect the ledge and could not for that reason, under the rule stated by the Supreme Court, be considered an end line.

We contend that both the letter and spirit of the law are with the plaintiff in error.

Respectfully submitted,

W. B. HEYBURN,

Attorney for the Plaintiff in Error.

166-720

NO....755

In the Supreme Court of the United States.

October Term, 1896.

GEORGE W. RUSS, Petitioner,

v.

COUNT J. TELFENER.

Petition for Writ of Certiorari.

CLARENCE H. MILLER,
JOS. WHEELER,
FRANZ FISET,
For Petitioner.

HUTCHINGS PRINTING CO., AUSTIN.

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Petition for Writ of Certiorari.

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FRANZ FISET,
For Petitioner.

To the Honorable, The Judges of the Supreme Court of the United States:

The petition of Geo. W. Russ respectfully represents that this case has already been twice before this court. It was first reversed for an error in the charge of the trial court, as to the measure of damages. (145 U. S., 522.) The case was next before this court on a writ of certiorari and the judgments of the trial court and Circuit Court of Appeals in favor of Russ were reversed and the cause remanded with the direction to grant a new trial. (162 U. S., 170.) Upon application of Russ for rehearing, this court in 163 U. S., 100 explained in some important respects its opinion.

The nature of the case, the contract sued upon and the act of July 14, 1879 and amendments are all fully stated and set out in the statements of the case in the opinions of this court. At the last trial in the court below, the plaintiff, Russ, materially amended his petition so as to allege a cause of action free from the objections pointed out in the opinion in 162 U. S., 170 of this

court. Instead of suing upon the two contracts formerly sued upon, he now sues only upon the first instrument in writing, exhibit "M" in the statement of the case in 145 U. S., 552, by the terms of which Russ merely agreed to transfer and assign all the right, title and interest he had at the date of the contract, or that he might thereafter acquire in and to the lands by reason of his application and files, and Telfener agreed to pay the consideration, if the application and files were in due form and regular, not later than November 15, 1882, and to himself have the surveys made and filed with the maps and field notes so as to obtain title from the State. (Record, 12-14.)

Plaintiff further alleged in the amended petition that the contract was not for a sale of the lands, but stipulated for the sale of all the right, title and interest he had November 1, 1882, the date of the contract, or that he might thereafter be entitled to, by reason of having previously (Oct. 4th and 5th) made an application in due form and filed same, and that while he (Nov. 1st) had no title nor right to the title as against the State, yet under the terms of the law, he had the exclusive right as against Telfener and other would-be-applicants, for ninety days to take the next step, the surveys, towards acquiring said lands from the State (Rec., 6); that the contract was entered into by Telfener with full knowledge on his part of the situation and of what he was buying, and that the rights, contracted to be bought and sold were in law and equity a valid subject matter of sale; that the lands were all surveyed before November 1, except 98 sections, and these were surveyed before November 15; that if plaintiff had no claim, November 1, to the whole body of land he, by virtue of the surveys and section 8 of the act, acquired the exclusive privilege, as against every one but the State, for sixty days after the surveys to take the other steps necessary to obtain title to the whole body of land, and this right he acquired before Telfener was to pay anything November 15, and the contract was therefore valid when made, as a sale of rights to be acquired in the future. (Rec. 6, 10.)

Plaintiff further says that he did all he contracted to do and was ready, able and willing to transfer and assign, November 15, all that he had contracted to sell and all that Telfener offered to buy, and in fact more, since it was Telfener's undertaking to have the surveys made; that Telfner by purposely absenting himself,

prevented plaintiff from tendering a deed or other conveyance, and therefore excused such tender; that plaintiff's cause of action accrued and was perfected November 15, when Telfener made default, but solely to protect Telfener's interest and allow him time to come forward and redeem his promises, plaintiff took all the other steps towards acquiring title to said lands from the State except pay for same, and January 8, 1883 could and would have conveyed to Telfener the perfected right to patents to all of said lands upon payment of the purchase money to the State, but Telfener declined and refused to give plaintiff an opportunity to make such conveyance.

It is further alleged that the surveys were begun October 13, and completed November 9, 1882, and the map, field notes and surveyor's certificate were returned to, accepted by and filed in the General Land Office, January 8, 1883, within sixty days from completion of the surveys; that Telfener could have obtained patents to all of said lands by complying with his contract and by paying within sixty days from said January 8, the fifty cents per acre to the State; that plaintiff did obtain patents to twenty-five section of said land that were surveyed November 3, and said surveys, although filed January 8, more than sixty days from November 3, were held by the Land Commissioner and State Treasurer to be returned and filed within the time prescribed by said act. (Rec., 11.)

Plaintiff also alleged that he caused all of the lands to be surveyed by the county surveyor and his deputies on the ground and the surveys were made in full compliance with section 3 of the act of July 14, 1897; that his exclusive right as against other persons than the State to purchase by reason of his application and surveys was a valuable right up to November 15, but that on that day the market value of the lands declined, and that in consequence the value of his exclusive privilege to purchase also declined and was unsaleable after that date. (Record 10.)

To the amended petition Telfener, the defendant below, interposed a general and several special demurrers, which the trial court, under its intepretation of the opinions of this court, sustained and the petition was dismissed at plaintiff's cost. Thereupon petitioner removed the case to the Circuit Court of Appeals for the Fifth Circuit by writ of error, and that court affirmed the judgment of the court below in the following opinion:

"When this case was last before the Supreme Court of the United States, the contract upon which plaintiff in error sues was fully examined, considered and construed, leaving, in our opinion, no ground upon which Russ, plaintiff below, plaintiff in error here, can maintain suit thereon. The judgment of the Circuit Court was to this effect and is affirmed." (Record 32.)

Petitioner in due time filed petition for rehearing in said court, which was, January 26, 1897, overruled. All the proceedings and holdings in said cause in said Circuit Court of Appeals will more fully and at length appear in the certified record filed herewith, and your petitioner submits there was manifest error in the rulings of the Circuit Court of Appeals in affirming the judgment of the Circuit Court; in this:

(1) The amended petition of the plaintiff below, your petitioner herein, with the contract sued upon attached as an exhibit thereto, stated a good cause of action against Count J. Telfener, defendant in error, and said Circuit Court and Court of Appeals erred in holding that there was no ground under the opinion of this court, when this cause was last before it, upon which Russ could maintain a suit.

(2) This court, when this case was last before it, based its opinion upon the theory that under the pleadings, as then before the court, plaintiff, could not recover upon the contract sued upon. The amended petition now before this court cured all the objections stated in that opinion and shows a good cause of action.

(3) It was not necessary in order to state a good cause of action upon the contract in suit to allege or prove that the plaintiff had caused all of the land to be surveyed on or prior to the execution of the contract.

(4) It was no valid objection to the cause of action stated in the amended petition that it was therein alleged that the map and field notes of the land were returned to and filed in the General Land Office long after the date of the contract in question.

(5) It was not necessary, under the opinion of this court, to allege or prove a tender or payment by Russ to the State of the purchase money for the lands in question in order to bestow upon him a cause of action for breach of the contract sued upon.

(6) If the plaintiff had at the date of the contract no vested

right to all of the lands embraced in the application, that fact does not prevent a contract from being binding as a sale of an interest thereafter to be acquired by plaintiff, and such an interest was acquired.

All of the above questions were presented in the general and special demurrers to the Circuit Court and the Circuit Court of Appeals, and were by said courts decided in favor of said Telfener.

Your petitioner respectfully submits that the lower courts have misinterpreted the opinions of this Honorable Court; that the rulings of said courts are contrary to the law as laid down by this Honorable Court, and that the case, a writ of certiorari having been previously granted in it, involves questions of such gravity and importance as to justify an application to your Honorable Court to issue the writ hereinafter prayed for.

Your petitioner therefore prays that your Honorable Court will issue a writ of certiorari according to the statute to the United States Circuit Court of Appeals for the Fifth Circuit to bring up the record of said cause of George W. Russ, plaintiff in error, against Count J. Telfener, defendant in error, of the November term, 1896, No. 537, so that the same may be heard by your Honorable Court. And your petitioner will ever pray.

GEO. W. RUSS, by
CLARENCE H. MILLER, his Attorney.

THE STATE OF TEXAS. }
COUNTY OF TRAVIS. } Clarence H. Miller, Attorney of Geo. W. Russ, being duly sworn, deposes and says that the facts set forth in the above petition are true to the best of his knowledge and belief.

CLARENCE H. MILLER.

Sworn to and subscribed before me, this 15th day of March, 1897.

H. M. LITTLE,
[SEAL] Notary Public, Travis County, Texas

I hereby take notice that the foregoing petition will be filed in the Supreme Court of the United States, accept service and waive time of same.

JOHN L. PEELER,
Counsel for Count J. Telfener.

Austin, Texas, March 15, 1897.

over

ARGUMENT:

The important question is to determine the scope of the court's opinion in this case, in 162 U. S., 170. We insist the gist of the opinion is that plaintiff failed to make out his case under the pleadings, as then before the court. This is made especially plain in the court's explanation on rehearing, (163 U. S., 100) where it is said:

"What we intend to say was that *under the pleadings*, and on plaintiff's contention as it seemed to be pressed, it was necessary that he should show that he had so far complied with the law as to have obtained a vested right to patents as against the State on making the required payments in the required time, etc."

Plaintiff then rested his case upon the contention that he had a vested right to purchase the land, solely by his application to purchase; that he had such vested right when he made the contract. The allegations in the petition as then before the court on this point were as follows:

"That on the 1st day of November, 1882, plaintiff was the sole owner of a certain valuable, valid and transferrable interest in the whole of a certain body of land, containing, as subsequently ascertained by lawful survey, eighteen hundred and thirteen tracts of land of six hundred and forty acres each. * * * That plaintiff had become the owner of said interest in said eighteen hundred and thirteen tracts by complying with the requirements of the laws of the State of Texas. * * *

"And plaintiff further avers that he was at the date of said contract (November 1st, 1882) able and duly authorized to make such contract of sale, and to execute and deliver to the defendant a proper and valid assignment and transfer of his application and of all plaintiff's rights, titles and interest thereunder."

This court, referring to these allegations, said:

"The claim of Russ, the plaintiff below, was that he had an assignable right on November 1, 1882, to 1813 sections of land for which he had made application in October of that year." (162 U. S., 182.)

This court further said:

"It does not appear that the entire tract of land was surveyed until after November 1, 1882. At that time 98 sections, embracing 62,720 acres of the tract, were unsurveyed, and it could not, in truth, be alleged that on the 1st day of that month the plain-

tiff was the sole owner of a valuable, valid and transferable interest in the whole body of land, embracing 1813 tracts, amounting to more than a million acres of land, as averred by him in his declaration. On the contrary, he possessed no interest in the whole body of land of that amount, and if the contract for the purchase was possessed of any validity, it must have applied to the whole body in its entirety and not to any particular portion thereof. (162 U. S., 175.)

II.

It was then argued before this court in behalf of Telfener that the interest which Russ undertook to sell, according to the petition, was an interest acquired under the act on the first day of November, 1882, in the *whole body* of the land described in the application.

In that petition Russ did claim to be the sole owner of such an interest on that date. The allegation was that "*on the first day* of November, 1882, plaintiff was the sole owner of a certain valuable, valid and transferable interest in the *whole* of a *certain body* of land." It was urged that according to plaintiff's own contention it was that interest, whatever it might be, that was the subject of the controversy; that he must stand or fall by the above allegation. It appeared from the petition, and also from the testimony, that no survey of the whole body of land had been made, or even attempted on the first day of November, 1882, and it was therefore contended that under the provisions of the statute, and by the adjudications of the courts, Russ was not, "on the *first day* of November, 1882, * * * the sole owner of a certain valuable, valid and transferable interest in the *whole* of a *certain body* of land containing, as subsequently ascertained by lawful survey, 1813 tracts of land of 640 acres each," but on the contrary that he on that date possessed no interest in the *whole body* of land; and under his own allegations there was a total failure of consideration.

Russ' reply was—and it was the theory under which that petition was drawn—that he acquired the alleged interest solely by virtue of a valid application to purchase the said land from the State under the act in question, accepted and filed in October, 1882, by the county surveyor of El Paso county. The Supreme Court overruled this view, however, in the first sentence of its

opinion, where it said: "No right, title or interest in the lands which Russ desired and applied to purchase passed to him solely by his application for the survey." This point being so decided, the whole theory of the former petition fell to the ground under the objections above stated.

Under the allegations of the former petition, if no interest in the lands passed to Russ solely by his application as held by this court, it was necessary he should show that November 1st, 1882, he had the surveys to all the lands completed and the maps and field notes thereof filed in the General Land Office; in other words, that on said date he had so far complied with the law as to have obtained a vested right to patents on making the required payments in the required time. No other proof would sustain the allegations as made. The testimony was that all of the land was not surveyed before November 1st, 1882, and hence this court held Russ had failed to make the necessary showing in view of the allegations that he was the sole owner of a certain valuable interest in the whole of a certain body of land.

III.

The gist of the amended petition on the contrary is that the contract was for the sale of such rights as plaintiff then had, or that he might thereafter acquire and that if he had no right at the time of the contract, he afterwards acquired same and the contract was valid as an agreement to sell rights to be acquired in the future. There is nothing against this view of the law in the opinions of this court. In equity a contract concerning a thing not yet in existence, either actually or potentially, or concerning a right or title to be wholly acquired in the future is valid and can be enforced. (Richardson v. Washington, 31 S. W. Rep., 614—Texas case; Lamb v. Davenport, 18 Wall, 307.)

The theory of the amended petition is fully warranted by the language of the contract where Russ agrees to transfer, assign and convey such right as he "now has or may be entitled to, in and to said lands by reason of such application and files?" The instrument of conveyance was to be made November 15, 1882. It was clearly not contemplated that Russ should take any further step before that date, and, therefore, the phrase "or may be entitled to" could not have reference solely to the rights under the application. The words "now has" fully covered all such rights, as the application was filed before November 1, and it is

so recited in the contract. The words "or may be entitled to" mean and can only refer to the right acquired by reason of the succeeding steps under the application. Whether such steps were taken by Russ or Telfener was immaterial as far as the State was concerned, provided they were taken in Russ' name. Telfener, with full knowledge of the situation expressly, agreed to take all the other steps that would result in conferring upon Russ a vested right to purchase the lands. To confer such right upon Russ he was required according to the last opinion of the Supreme Court, to have the lands surveyed and the map and field notes filed within proper time in the General Land Office. Is there any reason why Telfener's contract to do that should not be binding upon him? If he failed to do that and thereby failed to acquire a patent to the lands, can he plead his own neglect and failure as a reason why Russ can not recover his damages from him? The Supreme Court does not say so; its opinion is based upon the allegation in the original petition that Russ agreed to sell an interest in the lands acquired by him before the date of the contract; and further upon the terms of the supplemental contract, wholly omitted from the amended petition, as containing dependent covenants that Russ should do the surveying, etc.

IV.

That the contract, then under consideration, was materially different from the one now declared upon, is shown by the following language of the court in stating the case (162 U. S., 171):

"The action was brought for damages for an alleged breach of a contract, for the sale, by the defendant to the plaintiff, of certain unappropriated public lands of the State of Texas, the right to the title of which he claimed to have acquired from the State."

It is now alleged that the contract was for a sale not of the lands, for plaintiff had neither a title nor a right to the title to them, but was for a sale of such right, title and interest as plaintiff had at the date of the contract, November 1st, by reason of having made and filed an application in due form, October 5, and having thus acquired by section 3 of the law, for 90 days, the exclusive privilege as against Telfener and others to have the lands surveyed and, further was a sale of such a right, title and inter-

est as plaintiff might thereafter be entitled to by taking, either himself or through Telfener, the other steps towards acquiring title, and that by having had all the surveys completed before November 15, the day for payment by Telfener—plaintiff did acquire by virtue of section 8 of the law, if not a vested right to further proceed and acquire title, then at least acquired an exclusive right as against every one but the State, which right was, November 15 valuable and a valid subject matter of contract, and which right plaintiff was then ready, able and willing to transfer and assign to Telfener, and would have transferred had he not purposely, by his absence, prevented it being done.

Again, it is said in the statement of the case (162 U. S., 173):

"And that thereupon a contract was executed between them, Russ and Telfener, bearing date on that day, in two seperarate instruments, constituting, however, only one distinct contract in its entirety, and as such contract, with dependent conditions, it was declared upon, by the terms of which Russ, * * * agreed and promised to transfer and assign to Telfener all his (Russ's) right, title and interest in the lands applied for, the consideration being twenty-five cents per acre, which consideration Telfener promised to pay, and Russ also agreed to have the surveys made and filed with the maps and field notes in the General Land Office, for which Telfener was to pay him five cents per acre. It was for an alleged breach of this contract that the action of Russ the plaintiff below v. Telfener was instituted."

And in stating Telfener's contention, the court said:

"Fourth—But assuming that the plaintiff finally pursued fully all the proceedings required to obtain a right to purchase of Texas the whole amount of her unappropriated lands claimed, namely, 1,160,320 acres, and the contract alleged between Russ, the plaintiff, and Telfener, the defendant, was made, yet such contract was conditional and dependent upon the performance by the respective parties of the conditions developing upon each party at the time stipulated, and ceased to be binding upon either one on the failure of the other to comply with the performance stipulated on his part. Russ, the plaintiff, was to acquire of the State such interest in the property as would authorize him to sell and transfer to the defendant a valid title thereto, and to acquire such a valid title he was bound to make performance of his contract with the defendant by filing the surveys, map, and field notes of the whole

within the prescribed time so that the defendant might have the right to demand patents of the State on payment of the purchase money of such property to its treasury, which he never did, and therefore released the defendant of all obligations to perform the alleged contract on his part. Authority for this position will be found in the cases," etc. (162 U. S., 179.)

This language is inapplicable to the contract as now sued upon, and the allegations of the amended petition.

V

The only condition to be performed by Russ, under the terms of the contract, as now sued upon, exhibit A, was as follows:

"And the said Russ agrees and binds himself that upon such payment being made, he will execute and deliver to said Count Telfener any and all deed or deeds or other instruments that may be proper or necessary conveying, transferring and assigning unto the said Count Telfener all and singular the rights, titles and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application and files, binding himself by covenant of warranty against all persons claiming or to claim the same or any part thereof by, through or under him." (Rec., .)

Telfener, in the same instrument, agreed that "after the transfer and assignment, as aforesaid, shall have been made by the said Russ, the said Count Telfener shall proceed, without delay, and have said lands surveyed and platted and the field notes thereof returned and filed according to the provisions of said law." (Rec.)

In other words it appears from the contract, as now declared upon and the allegations of the petition, that Telfener agreed to pay, November 15, in consideration that plaintiff would not himself proceed, but would allow Telfener to proceed in his placed under said application and acquire title to the lands. As Russ had the right to proceed under his application, the yielding up of that right was a loss to Russ, whether or not it was an advantage to Telfener, and hence was a valuable consideration and a valid subject matter of contract. But Telfener wanted the lands covered by Russ' application, and could only obtain them by taking the steps necessary under the law, the first of which was an application; hence it was a gain to him both in time and money

to have Russ stand aside and allow him to step in his place and proceed under his application, either in the name of Russ and have the patent issued to him as assignee, or in his own name.

VI.

Would the fact that there was no vested right in Russ November 15, 1882, the time stipulated for payment by Telfener, excuse Telfener from the payment of the purchase money? The contract fixed that date as the time for payment, although it was not expected by either party that even the surveys should be completed by that time, and it was certainly known by them that the map and field notes would not before that time be filed in the Land Office, so as to bestow a vested right to complete the purchase. He agreed November 1, 1882, when application alone was made, to buy such rights as Russ might thereafter acquire by complying with the other provisions of the law. The consideration for Telfener's promises to pay was Russ' agreement to convey such right as he might acquire. This was a good consideration, and obligated Telfener to perform his part of the contract under the penalty of being liable for damages should he fail to comply.

VII.

Under the allegations of the amended petition and the terms of the contract, Exhibit A, plaintiff could maintain this suit, had nothing been done by him after November 1, the date of the contract. His agreeing to refrain from going forward under his application, his contracting to relinquish his undoubted right to proceed was a loss to him and the consequent gain to Telfener in time and money, in being able to go forward under plaintiff's application was unquestionably a valuable consideration. But while this proposition is correct in regard to the position of the parties under the application alone it is greatly strengthened in view of the allegation that before November 15, the day for payment by Telfener and conveyance by Russ, plaintiff had all the lands surveyed on the ground.

Section 8 of the act reads: "After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

Section is as follows:

"Sec. 3. It shall be the duty of the surveyor, * * * within sixty days after said survey, to certify to, record, and map the field notes of said survey; and he shall also within the said sixty days, return to and file the same in the General Land Office, as required by law in other cases.

In N. Y. L. Co. vs. Gardiner, 32 S. W., 786 the Texas Appellate Court holds that the law imposed upon the surveyor the duty to return and file in the Land Office the map and field notes, and his failure to perform this duty in time would not work a forfeiture of the rights of an applicant to obtain a patent.

Russ was therefore in a position, November 15, to confer upon Telfener a far more valuable right than he agreed to confer: if not indeed a vested right, to at least save Telfener much time and expense in acquiring such right and to put Telfener by a mere surrending of his, Russ' position that had cost time, labor and money; to place Telfener at once, and without an effort, on his part, far on the road towards getting a title to the lands.

VIII.

Whatever may be said about the necessity for a vested right, as against the State, or about plaintiff's claim for damages resting upon a contract to transfer merely his hopes of securing land for which he did not hold any promise or obligation of the State, or about Telfener's promise to pay any amount "for an acre of such hoped for, and not acquired lands being worthless, without any value or consideration," whatever may have been said to that effect in the former opinion of this court does not reach the case as presented in the amended petition.

The question of vested right and of plaintiff contracting to sell "hoped for and not acquired land" does not arise in the case as now presented. There was no agreement to convey vested right, nor the lands nor the legal title thereto. Russ never expected to sell the lands, nor Telfener to buy them from him, but from the State. He contracted to sell his position, something that had cost him time and money, and which could not, to say the least of it, have been acquired by Telfener without time and money, even if Russ' previous application and surveys were not a bar to such acquisition by Telfener; on this ground alone there was a good consideration for Telfener. But the application and survey were a bar, the latter by the express terms of section 8 of the act.

IX.

This court has recognized in many cases that a right exclusive as to other persons, but not vested as against the State may be a good consideration for a contract. This case as now presented in the amended petition comes directly under these decisions. In Bear Lake Co. v. Garland, decided by this court October 19, 1896, Mr. Justice Peckham uses this pertinent language:

"Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession from the mere fact of such possession unaccompanied by the perfomance of any labor thereon.

"Undoubtedly rights as against third persons are acquired by priority of possession, and the government will and does recognize such rights as between those parties. This is the principle running through the cases cited by the counsel for appellants."

The case of Buxton v. Traver, 130 U. S., 235 is in point. It is there said:

"A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. * * * *

"He has been permitted by the government to occupy a certain portion of the public lands and therefore is not a trespasser, on his statement that when the property is open to sale, he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to pre-empt it. The United States makes no promise to sell him the land, nor do they enter into any contract with him upon the subject."

In Gonzales v. French, decided by this court, November 30, 1896, Mr. Justice Shiras in referring to the Yosemite Valley case and others, said:

"When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land offices, and ultimately to a patent of the United States. Until such payment and entry, the acts of congress gave to the seller only a privilege of preemption in case the lands were offered for sale in the usual man-

ner: that is, the privilege to purchase them in that event in preference to others."

In Lamb v. Davenport, 18 Wall. 307, it is decided that contracts made between individuals concerning their inchoate right, and the title to be acquired, are valid, even though this right is not vested, and the government is under no obligation to convey to either party.

These decisions clearly settle that it was not necessary for Russ to tender to Telfener a vested right to complete the purchase as against the State in order to perform his covenant under the contract, and put Telfener in default. On the contrary they decide that Russ' offer to transfer, November 15, the exclusive privilege to proceed and purchase, obtained by his previous applications and surveys, was a complete performance on his part of a binding contract, founded upon a good consideration, and that Telfener's willful refusal to accept the transfer and pay the money, gave Russ an immediate right of action.

X.

If this contention is correct as applied to the amended petition the question as to whether Russ subsequently acquired a vested right by taking the other necessary steps under the law, becomes wholly immaterial. We insist that this is so, but out of abundant caution plaintiff alleged what was done by Russ to protect Telfener's interest, and that January 8, 1883, Russ had a vested right to all the lands and was then, and has ever since been ready to convey same to Telfener. From the facts alleged in this connection, the question arises whether the map and field notes were filed in time in the Land Office. It appears that the surveys of the 1815 sections were begun October 13 and completed November 9, 1882, and the map and field notes were all filed in Land Office January 8, 1883. We contend these were within the time required under section 3 of the act.

Section 3, reads: "It shall be the duty of the surveyor * * * to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record and map the field notes of said survey. * * *"

The expression, "within sixty days after said survey" has reference to the first part of said section, which makes it incumbent

upon the surveyor to survey the lands designated in said application. Substituting, then, these words for the words of "said survey," the section reads in the second part, * * * "and within sixty days after the survey of the lands designated in said application to certify to, record, map, etc. * * *"

The lands designated in said application are the whole body of the land therein designated. Consequently the statute in the section quoted expressly provides that the field notes shall be recorded, mapped, etc., and same returned to and filed in the General Land Office within sixty days after the whole body of land designated in the application has been surveyed. The field notes and map of the land in controversy, it is alleged, were filed in the General Land Office, January 8, 1883, within sixty days after November 9, 1883, when the survey was completed.

Moreover, the officials of the General Land Office were the parties who were called upon, under the law, to determine whether or not the field notes were filed in time, and they having accepted and filed same, with knowledge of the date of the survey of each section, concludes the matter. They not only received and filed the field notes, but treated them as entitling Russ to a patent upon payment of the 50 cents per acre.

The conclusiveness of the determination by such officers of the facts upon which they might act in issuing a patent for land is maintained in Barden vs. R. R. Co., 154 U. S., 327, et seq. The determination by the Land Commissioner and Treasurer that the field notes to the twenty-five section alleged to have been surveyed November 3, 1882, and returned January 8, 1883 were filed within sixty days after the survey and issuance of patents for said twenty-five sections, necessarily leads to the conclusion that the survey of the entire 1813 sections were considered as one survey, and that the field notes to same were filed in time.

Again the law imposes the duty of making such return, not upon the applicant, but upon the surveyor, and the failure to make such return within the time, by the surveyor, is not a reason for forfeiture under the terms of the act.

The ninth section of the act contains the only provision for a forfeiture of the right secured by a survey, and that provision is, that should any applicant for the purchase of public land, fail, refuse or neglect to pay for same at the rate of 50 cents per acre, within the time prescribed in section 5 of this act, he shall for-

feit all right thereto, and he shall not be allowed thereafter to purchase the same. This is clearly decided by the Texas court in New York Land Company vs. Gardiner, 32 S. W. Rep., 786.

No forfeiture for any other reason is stipulated for in said law, and it would follow as a legislative intent and the fair import of the law that the failure to pay at the rate prescribed per acre, within the time stipulated for by the law, is the only cause for forfeiture; that, unless other conflicting rights have accrued in the meantime, failure to comply with the steps prior to the payment within the limits put upon them by law, would not work a forfeiture of such right. This construction of the law is maintained in analogous cases. (Craig v. Bradford, 3 Wheat, 593; Taylor v. Brown, 5 Cranch, 234; Stringer v. Terseer, 3 Pet., 320.)

XI.

Russ was therefore in a position, January 8, 1883, to even bestow upon Telfener a vested right to demand the patents for all the lands upon payment to the State of the purchase money. So that, however, the former opinion of this court may be interpreted a good cause of action is stated in the amended petition.

We respectfully ask that the judgment of the Circuit Court and Circuit Court of Appeals be reversed and the cause remanded with directions to set aside the judgment of dismissal, reinstate the cause and overrule defendant's general and special demurrers.

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